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4 Attorneys for STATE OF ARIZONA

5 **IN THE SUPERIOR COURT**

6 **STATE OF ARIZONA, COUNTY OF YAVAPAI**

7 STATE OF ARIZONA,

8 Plaintiff,

9 vs.

10 JAMES ARTHUR RAY,

11 Defendant.

V1300CR201080049

12 **MOTION FOR RECONSIDERATION OF**
13 **IMPOSITION OF MONETARY SANCTIONS**
14 **AGAINST THE STATE IN CONNECTION**
15 **WITH DEFENDANT'S MOTION TO**
16 **COMPEL**

17 (The Honorable Warren Darrow)

18 Comes now the State of Arizona, through undersigned counsel, and respectfully requests
19 this Court to reconsider its Order granting Defendant's request for monetary sanctions in
20 connection with Defendant's Motion to Compel Disclosure of Information and Material
21 Regarding Medical Examiners' Opinions on Cause of Death and Request for Sanctions. Reasons
22 in support of this Motion are set forth in the Memorandum of Points and Authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 On September 20, 2009, this Court granted Defendant's above-referenced motion,
25 ordering the State to provide to Defendant the December 14 PowerPoint prepared by the Yavapai
26 County Sheriff's Office; to disclose the identities of the individuals present at the December 14
pre-indictment meeting; to disclose the personal notes of the attorneys, their staff and the
investigators that were taken at the meeting summarizing the medical examiners' oral
communications at the meeting; and to make the investigators and the medical examiners

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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CLERK OF SUPERIOR COURT

BY: BOBBI JO BALL

1 available for re-interviews by Defendant. The State fully and timely complied with the Court's
2 Order, providing the PowerPoint (individual color 8" x 10" photocopies) and notes to Defendant
3 and making all the witnesses available for re-interviews. The State does not request
4 reconsideration of this Court's Order with respect to the mandated disclosure. However, the
5 State continues to believe it acted in good faith in denying Defendant's requests for these
6 materials which the State honestly believed and continues to believe were non-disclosable work
7 product. Notwithstanding this belief, the State complied with this Court's order without further
8 litigation in the interest of moving forward with the prosecution of this case.

9
10 **I. Monetary sanctions are not appropriate under the circumstances of this case.**

11 The State requests this Court to reconsider its Order awarding sanctions against the State
12 for the reasons that the State acted in good faith in denying Defendant's request for the materials.
13 The State believed, and continues to believe, the materials were non-disclosable work product
14 not covered by Rule 15.1, Arizona Rules of Criminal Procedure; as such, Defendant's access to
15 the material was covered by Arizona Rules of Criminal Procedure Rule 15.1(g), not Rule 15.7;
16 and sanctions were not appropriate and should not have been awarded.

17
18 **A. The Court did not find that disclosure was mandated by Rule 15.1**

19 The basis for this Court's ruling was the conclusion that information was presented at the
20 December 2009 meeting that was considered by the medical examiners and therefore must be
21 disclosed. In the Court's Order, the Court specifically noted that "[w]hether some or all of the
22 information presented to the medical examiners at the December, 2009, meeting may be labeled
23 as a type of 'work product' is not the pivotal question presented by the Defendant's motion to
24 compel and request for sanctions. The crucial and undisputed fact is that at the December
25 meeting information was presented to the medical examiners." *Minute Entry dated Sept. 20,*
26

1 2009, 2nd para. Thus, this Court did not address the issue of whether the materials were work
2 product under the definitions set forth in Rule 15.4(b)(1), Ariz. R. Crim. P., and Rule 502(f),
3 Ariz. R. Evid.

4 Given its good faith belief that the materials at issue were non-disclosable work product
5 under these rules, the State was prepared to litigate the issue. The fact that parties disagree on
6 whether an item falls under the disclosure requirements set forth in Rule 15 does **not** merit the
7 imposition of sanctions on either party. It is the role of the Court to resolve such disagreements.
8

9 **B. Defendant's access to the material was covered by Rule 15.1(g), not Rule 15.7**

10 The State believed, and continues to believe, that the requested materials were not
11 covered within the parameters of Rule 15.1, Ariz. R. Crim. P., and were specifically **excluded**
12 from disclosure requirements by Rule 15.4(b)(1) as work product. Rule 15.1(g), Ariz. R. Crim.
13 P., provides a procedure for a defendant to file a motion with the court to obtain disclosure of
14 information not covered by Rule 15.1. The State anticipated Defendant would move the Court to
15 order disclosure pursuant to Rule 15.1(g), Ariz. R. Crim. P. and that the issue would ultimately
16 be briefed and resolved by the Court under the procedures set forth in Rule 15.1(g). Instead,
17 Defendant moved to compel the materials and for sanctions under Rule 15.7, Ariz. R. Crim. P.
18

19 As noted above, the State does not believe that sanctions are appropriate in cases of
20 genuine disputes over whether material is covered under Rule 15.1. Had this Court found that
21 Defendant had a substantial need for the material in preparation of his case and that the material
22 was not otherwise covered by Rule 15.1, sanctions could not have been imposed. In fact, the
23 Court did not find that the material was covered by Rule 15.1 and seems to have made a finding
24 that Defendant had a substantial need for the material. Using Rule 15.7 to address this issue, and
25 awarding sanctions there under, was unwarranted and not supported by the facts of this case.
26

1 **C. This Court may decline to impose a sanction under Rule 15.7 because the State**
2 **acted in good faith**

3 The Committee Comment to the 2003 Amendment to Rule 15.7 states, "The court may
4 decline to impose a sanction if the failure to comply was harmless or the non-disclosing party has
5 acted diligently and in good faith." There is absolutely no evidence that the State was acting in
6 bad faith when it refused to disclose the PowerPoint and the participants' personal notes taken at
7 the pre-indictment charging meeting on December 14, 2009. Immediately following the meeting
8 and months before Defendant was charged, the State had notified the participants that it
9 considered the meeting and the PowerPoint work product and asked participants to respect that
10 privilege with respect to copies of the PowerPoint that had been disseminated. *Exhibit A,*
11 *attached, Letter from Sheila Polk dated December 16, 2009.*

12 The State's good faith is in stark contract to the facts in *State v. Meza*, 203 Ariz. 50, 50
13 P.3d 406 (App. 2003). In *Meza*, the Court of Appeals awarded restitutionary monetary sanctions to
14 the defendant to alleviate costs undertaken due to what the court characterized as an "egregious
15 course of conduct" of discovery violations by crime lab personnel. In *Meza*, the Phoenix Police
16 Department Crime Lab withheld evidence relating to the Intoxilyzer 5000, *and* the state expert
17 intentionally gave false testimony regarding the deletion of database results for the calibration
18 checks of the Intoxilyzer 5000 machine used to determine the defendant's alcohol concentration.
19 The expert claimed he was unaware test results could be deleted from the database, when he in fact
20 had personally deleted several such results. *Id.* at 52, ¶ 5, 50 P.3d at 409. Although the Court
21 found the prosecutor's office was unaware of the actions of the lab personnel, the Court found
22 monetary sanctions were appropriate due to the extreme conduct and the resulting harm to the
23 defendant.
24
25
26

1 "Gross negligence" does not, in our judgment, accurately summarize the Crime
2 Lab's actions. Instituting an unwritten, rogue practice of deleting evidence of failed
3 calibration checks; withholding evidence from the prosecution, the defendant, and
4 the court; misleading the court in testimony under oath-these acts amounted at a
5 minimum to willful nondisclosure and richly warranted a sanction under Rule 15.7.

6 *Id.* at 57, ¶ 29, 50 P.3d at 414.

7 The Court of Appeals found it was "apparent that hundreds of hours of time, with
8 commensurate costs, were wrongfully thrust upon [the defendant] and his counsel by the State" for
9 failing to disclose the deleted test results. *Id.* at 58-59, ¶ 38, 50 P.3d at 415-16. The case was
10 remanded "with instructions to the trial court to assess, as an additional discovery sanction, the
11 reasonable costs and fees that the defense has incurred as a consequence of the sanctionable
12 conduct of the State." 203 Ariz. at 59-60, 50 P.3d at 416-17.

13 To the best of the State's knowledge, *Meza* is the only Arizona criminal case where a
14 monetary sanction involving attorney fees for a disclosure violation has been addressed. In
15 contrast to the case at hand, the award in *Meza* was not the result of a legitimate disagreement
16 over whether or not materials were subject to disclosure. Instead, it was the result of egregious
17 and willful withholding of exculpatory material by crime lab personnel. There is no such issue in
18 this case. The State has complied with its disclosure obligations and is continuing to comply. The
19 fact that parties disagreed and required this Court to resolve a legitimate disagreement does **not**
20 merit the awarding of attorney fees to a criminal defendant.

21 In this case there has been and will continue to be disagreements that will need to be
22 decided by this Court. For example, very early in the proceeding, Defendant issued subpoenas to
23 the medical providers that treated the victims in this case. These subpoenas were in direct
24 violation of the plain language of A.R.S. § 13-4071(D), Rule 15, *et seq.*, Ariz. R. Crim. P., and
25 Arizona case law. *Carpenter v. Superior Court In and For County of Maricopa*, 176 Ariz. 486, 862
26

1 P.2d 246 (App. 1993). As a result of this action, the State had to expend resources to obtain a stay of
2 the subpoenas and litigate the issue. The State never sought to recover the cost of this litigation even
3 though it was the result of a clear violation of the plain language of Arizona's criminal statutes.

4 The State also was forced to file a Motion for Protective Order in response to Defendant's
5 demands for the notes of the attorneys taken during meetings with the State's experts. Again, the
6 State prevailed on this issue, never seeking monetary sanctions against Defendant to recover costs.
7 While the State could find no Arizona cases that directly address the issue before this Court, in a
8 case involving an attorney disciplinary proceeding, our Supreme Court has stated that they do
9 not "sanction lawyers for good faith errors of law." *In re Alcorn*, 202 Ariz. 62, ¶ 28, 41 P.3d 600,
10 608 (2002). That is exactly what this Court's Order awarding sanctions does.

11 CONCLUSION

12 The State promptly disclosed to Defendant all the information ordered by this Court on
13 September 20, 2009, in the interest of moving this case forward, and arranged for re-interviews
14 of all requested witnesses. The State does not believe, however, it should be sanctioned for its
15 good faith belief that any information relating to the December 2009 meeting falls under the
16 definition of work-product and was therefore not subject to disclosure pursuant to Rule
17 15.4(b)(1), Ariz. R. Crim. P. and Rule 502(f), Ariz. R. Evid. The State therefore respectfully
18 requests this Court to reconsider and reverse its award of sanctions to Defendant.

19 RESPECTFULLY submitted this 21st day of January, 2011.

20
21
22 By Sheila Sullivan Polk
23 SHEILA SULLIVAN POLK
24 YAVAPAI COUNTY ATTORNEY
25
26

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COPIES of the foregoing emailed this
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By: Kathy Durrer

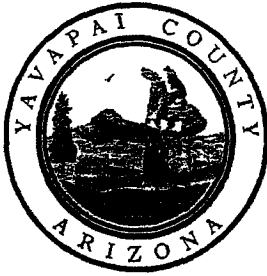
COPIES of the foregoing delivered this
21st day of January, 2011, to

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SHEILA POLK
Yavapai County Attorney

December 16, 2009

Dr. Mark Fischione
Maricopa County Medical Examiner's Office
701 W. Jefferson Street
Phoenix, AZ 85007

RE: *Yavapai County Sheriff's Office - Case Number 09-040205*

Dear Dr. Fischione:

Thank you for attending the meeting regarding the above-referenced investigation on Monday, December 14, 2009. Your time is valuable and we appreciate your attention to this case.

At the meeting and via email, a copy of the PowerPoint presentation was disseminated. The PowerPoint presentation is privileged material, prepared as work product by the Yavapai County Sheriff's Office to assist in analyzing the facts of the case. Furthermore, it is a work in progress in draft form only. **It is not a public record and not for public dissemination beyond those in attendance at our meeting.** Please ensure that the confidentiality of the document is respected and maintained.

Thank you again for your work on this case. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sheila S Polk".

Sheila Sullivan Polk
Yavapai County Attorney

Exhibit A
Letter from Sheila Polk
dated December 16, 2009